IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 29TH NOVEMBER 2007 / 8TH AGRAHAYANA 1929

SA.No. 708 of 1994(A)

AS.94/1992 of DISTRICT COURT, THALASSERY
OS.68/1989 of SUB COURT, PAYYANNUR

.....

APPELLANTS:

---

1. UPPUVALAPPIL NEBESSUMMA,
W/O.ABDULA HAJEE,
KOOVERI AMSOM, CHAPPARAPADAVU DESOM,
TALIPARAMBA.

2. UPPUVALAPPIL USMAN,
S/O.ABDULA HAJEE,
KOOVERI AMSOM, CHAPPARAPADAVU DESOM,
TALIPARAMBA.

3. UPPUVALAPPIL KUNHAMMED,
S/O.ABDULA HAJEE,
KOOVERI AMSOM, CHAPPARAPADAVU DESOM,
TALIPARAMBA.

4. UPPUVALAPPIL ABDUL RAZAK,
S/O.ABDULA HAJEE,
KOOVERI AMSOM, CHAPPARAPADAVU DESOM,
TALIPARAMBA.

5. UPPUVALAPPIL ABOOBACKER,
S/O.ABDULA HAJEE,
KOOVERI AMSOM, CHAPPARAPADAVU DESOM,
TALIPARAMBA.

BY ADV. SRI.K.V.SOHAN
SRI.M.P.ASOK KUMAR

SA.No. 708 of 1994(A)

RESPONDENTS:
---

1. UPPUVALAPPIL ABDURAHIMAN,
S/O.ABDULA HAJEE,
KOOVERI AMSOM, CHAPPARAPADAVU DESOM,
TALIPARAMBA.

2. UPPUVALAPPIL ABDUL KHADER,
S/O.ABDULA HAJEE,
KOOVERI AMSOM, CHAPPARAPADAVU DESOM,
TALIPARAMBA.

3. K.S.KRISHNA IYER,
S/O.SIVARAMAKRISHNA IYER,
WARD NO.T.P.VII, HOUSE NO.279,
TRICHAMBARAM AMSOM, DESOM, TALIPARAMBA.

4. K.S.VENKITARAMA IYER (DIED)
S/O.SIVARAMAKRISHNA IYER,
WARD NO.T.P.VII, HOUSE NO.279,
TRICHAMBARAM AMSOM, DESOM, TALIPARAMBA.

5. K.S.SUBRAMANYA IYER (DIED)
S/O.SIVARAMAKRISHNA IYER,
WARD NO.T.P.VII, HOUSE NO.279,
TRICHAMBARAM AMSOM, DESOM, TALIPARAMBA.

6. K.S.RAMA IYER,
S/O.SIVARAMAKRISHNA IYER,
WARD NO.T.P.VII, HOUSE NO.279,
TRICHAMBARAM AMSOM, DESOM, TALIPARAMBA.

7. UPPUVALAPPIL IBRAHIMKUTTY,
S/O.ABDULA HAJEE,
KOOVERI AMSOM, CHAPPARAPADAVU DESOM,
TALIPARAMBA.

(*)ADDL.R8 K.SIVARAMAKRISHNA IYER,
S/O.LATE K.S.VENKITARAMA IYER,
WARD NO.T.P.VII, HOUSE NO.279,
TRICHAMBARAM AMSOM, DESOM, TALIPARAMBA,
KANNUR DISTRICT.

(*)ADDL.R9 K.V.LALITHA,
D/O.LATE K.S.VENKITARAMA IYER,
WARD NO.T.P.VII, HOUSE NO.279,
TRICHAMBARAM AMSOM, DESOM, TALIPARAMBA,
KANNUR DISTRICT.

SA.No. 708 of 1994(A)

(*)ADDL.R10 SUDHA AMMAL,
W/O.LATE K.S.SUBRAMANYA IYER,
TRICHAMBARAM AMSOM, DESOM, TALIPARAMBA,
KANNUR DISTRICT.

(*)ADDL.R11 SIVARAMANL,
S/O.LATE K.S.SUBRAMANYA IYER,
TRICHAMBARAM AMSOM, DESOM, TALIPARAMBA,
KANNUR DISTRICT.

(*)ADDL.R12 LAKSHMI,
D/O.LATE K.S.SUBRAMANYA IYER,
TRICHAMBARAM AMSOM, DESOM, TALIPARAMBA,
KANNUR DISTRICT.

(*) ADDL.R8 AND R9 IMPLEADED AS THE LEGAL REPRESENTATIVES OF DECEASED R4 AS PER ORDER DATED 01/04/2002 IN C.M.P.NO.2069/2001

(*) ADDL.R10 TO R12 IMPLEADED AS THE LEGAL HEIRS OF THE DECEASED 5TH RESPONDENT AS PER ORDER DATED 22/07/2003 IN C.M.P.NO.1632/2002.

BY ADV. SRI.C.S.ANANTHAKRISHNA IYER (SR.)
SRI.S.V.BALAKRISHNA IYER FOR R3 AND ADDL.R8
SRI.B.PREMNATH (E)
SRI.K.JAYAKUMAR FOR ADDL.R8 AND ADDL.R9
SRI.S.V.BALAKRISHNA IYER
SRI.MOHAMMED RAVUFF FOR R4
SRI SAJAN VARGHESE

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 29/11/2007,THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON C.M.P.NO.1522/1994 IN S.A.NO.708/1994

DISMISSED.

SD/- M.SASIDHARAN NAMBIAR, JUDGE

29/11/2007

\\TRUE COPY//

M.SASIDHARAN NAMBIAR, J.

~ ~ ~ ~ ~ ~ ~ ~ ~ ~ ~ ~ ~ ~ ~

S.A.No.708 of 1994-A

~ ~ ~ ~ ~ ~ ~ ~ ~ ~ ~ ~ ~ ~ ~

J U D G M E N T

29th November, 2007

M.SASIDHARAN NAMBIAR, J.

.....

S.A.No. 708 OF 1994

.....

DATED THIS THE 29th DAY OF NOVEMBER, 2007

JUDGMENT

Defendants 1 to 3, 6 and 8 in O.S.68 of 1989 on the file of Sub Court, Payyannur are the appellants. Respondents 1 to 7 are the plaintiffs. On the death of 4th respondent, additional respondents 8 and 9 were impleaded as his legal heirs. Respondents instituted the suit seeking a decree for recovery of possession on the strength of title. Case of respondents was that plaint schedule property, along with other properties, belonged in jenmom to Padappengat Devaswom and Sivaramakrishna Iyer, their father obtained the properties under Ext.A1 registered marupat of 1937 and under Ext.A2, he surrendered some of the properties and retained plaint schedule properties as per registered surrender deed dated 22.11.1939 and on the death of Sivaramakrishna Iyer, his rights devolved on respondents, the legal heirs. It is contended that while so, Chelantekath Avokker plucked cashewnuts from the cashew trees and claiming damages, respondents filed O.S.114 of 1975 against Abdulla Haji and Chelantekath Avokker before Munsiff Court, Taliparamba and Commissioner inspected the property,

identified the property and submitted Ext.C1 report and C2 plan and plots B and C marked in Ext.C2 plan is the plaint schedule property herein. It was contended that suit was decreed in favour of respondents and legal heirs of Abdulla Haji and appellants challenged that judgment before Sub Court, Thalassery in A.S.202 of 1976 and that appeal was dismissed which was challenged before this court in CRP 2942 of 1978 and this court set aside the decree on the ground that there was no evidence to prove that defendants in that suit plucked cashewnuts. It is contended that the said decree does not affect the right or title of respondents to the plaint schedule property and they are entitled to claim recovery of possession of the property on the strength of title. It was also contended that they purchased jenmom right from the Land Tribunal under Ext.A9 order and also obtained Ext.A37 purchase certificate. It was further contended that after disposal of the CRP on 10.1.1997, appellants cut standing trees and caused damages and therefore respondents filed O.S.119 of 1977 before Munsiff Court, Taliparamba and that suit was dismissed as damages were not proved and after disposal of the revision by this court under Ext.A16 judgment, appellants started openly and publicly

plucking cashewnuts and pepper from the plaint schedule property and therefore respondents are entitled to recover possession of the plaint schedule property on the strength of their title.

2. Appellants in their written statement contended that there is no property as plot B and C marked in Ext.C2 plan in O.S.114 of 1975 and without fixing the boundaries and identifying the properties, respondents cannot claim title to the property. It was admitted that O.S.114 of 1975 was filed against the husband of first appellant and father of appellants before Munsiff Court, Taliparamba. But it was contended that in the CRP, suit was dismissed and findings in that suit are not binding on appellants. It was further contended that southern boundary of some portion of the property is a river and some portion is in the possession of Chelan Mammad and on the western side Kadambel thodu and the property of Vengayil tarwad and some portions on the northern side belongs to Vazhavalappil Nebissu and some portions on the norther side belongs to Vazhavalappil Ummar and the properties formerly were in the possession of Kunhan and Sainaba and first appellant continued in possession of the property and first appellant and his predecessors were in

possession of the property from 1957 onwards denying the rights of the respondents and the cashew trees were planted and usufructs were being collected by appellants and therefore even if respondents have title, it is barred by limitation. It was further contended that Vazhavalappil Nebissu orally obtained from Padappengat Devaswom properties in R.S.48/1 from Devaswom and also obtained purchase certificate as per Ext.B11 order in O.A.8839/1976 and one Abdul Khader got assignment of the properties on 21.1.1984 and he is in possession of the property and respondents are not entitled to the decree sought for.

3. Learned Sub Judge, on the evidence of PWs 1 & 2, DW1, Exts.A1 to A36, B1 to B26 found that plaint schedule property is plot B and C marked in Ext.A13 plan prepared by the Commissioner in O.S.114 of 1975 and it is part of the property which was obtained by the father of respondents under Ext.A1 pattom deed and retained with him after Ext.A2 surrender and respondents have title to the said property. Learned Sub Judge also found that the properties claimed by appellants is not part of the property covered under Ext.A1 excluding Ext.A2. It was also found that under Ext.B2 order of the Land Tribunal, appellants cannot claim title to the property when under Ext.A30

order in O.A.2540 of 1975, the claim for tenancy raised by Nebissu was rejected earlier, when it was objected to by respondents on the strength of judgment in O.S.114 of 1975. Learned Sub Judge also found that the title of respondents was not barred by adverse possession of limitation. Appellants challenged the judgment before District Collector, Thalassery in A.S.94 of 1992. Learned District Judge, on reappreciation of evidence, confirmed the findings of learned Sub Judge and dismissed the appeal. It is challenged in the second appeal.

4. The second appeal was admitted formulating the following substantial questions of law.

1)When a suit for damages is found against a defendant, who set up adverse possession against the plaintiff in the later suit is not adverse possession commences against the plaintiff at least from the date of filing of the written statement in the former suit and is not a subsequent suit for recovery barred by adverse possession.

2) What is the effect of a certificate of purchase obtained by the appellants with reference to the disputed property when the respondents were also parties before the Land Tribunal.

5. Learned counsel appearing for appellants and

respondents were heard.

6. Learned counsel appearing for appellants vehemently argued that when the suit is for recovery of possession on the strength of title, without identifying the plaint schedule proeprty, a decree cannot be granted. It was argued that though title claimed is under Ext.A1 excluding the property surrendered under Ext.A2, it is also the case of respondents that they purchased jenmom right from the Land Tribunal under Ext.A9 order and Ext.A37 purchase certificate was obtained and therefore Ext.A1 lease merged with Ext.A9 order and Ext.A37 purchase certificate and under Ext.A9 and Ext.A37, purchase certificate was granted in respect of 28.30 acres and without identifying the said property and establishing that plaint schedule property forms part of that property, respondents are not entitled to the decree sought for. Learned counsel also argued that courts below should not have relied on Ext.A13 report and plan submitted by the Commissioner in the earlier suit and should not have found that respondents have title to the property based on Ext.A13. It was further argued that when O.S.114 of 1975 was dismissed by this court under Ext.A16 judgment in CRP 2942 of 1978, courts below should have found

that appellants have been in possession of the property at least on the date when O.S.114 of 1975 was filed and therefore as the present suit was filed only on 1.8.1989, it should have been found that title is barred by adverse possession and limitation. Learned counsel also argued that in the light of Ext.B2 order of the Land Tribunal, pursuant to which Ext.B16 purchase certificate was granted, it should have been found that appellants obtained jenmom right from the Land Tribunal and have title to the plaint schedule property and respondents have no title.

7. Learned counsel appearing for respondents argued that in the light of the substantial questions of law formulated, appellants are not entitled to canvass the factual findings of courts below. It was pointed out that question of identity of the property covered under Ext.A1 and A2 as well as the documents relied on by appellants were elaborately considered in the earlier suit in O.S.114 of 1975 as well as A.S.198 of 1976 and A.S 202 of 1976 preferred against the said judgment and under Ext.A15 judgment it was found that plots B and C marked in Ext.C2 plan, which is Ext.A13 plan in the present suit, is the property of respondents and plot B belongs to the respondents and is in their

possession and claim of Nebissu was only in respect of plot C and in such circumstances, courts below rightly found that respondents have title to the plaint schedule property. It was also argued that there is no finding in the earlier suit that respondents are not in possession of the plaint schedule property and instead specific finding was that plot B is in the possesion of the respondents herein and suit was dismissed only for the reason that the plucking of cashewnuts by defendants were not established and not for the reason that defendants in that suit were in possession of the property and in such circumstances, appellants cannot claim that they have been in possession of the property for more than 12 years prior to the institution of the suit and finding of the courts bleow that the suit is not barred by adverse possession and limitation is perfectly correct and appeal is only to be dismissed.

8. Admittedly plaint schedule property originally belonged in jenmom to Padappengat Devaswom. Ext.A1 establishes that three items of properties were obtained by Sivaramakrishna Iyer on lease from the Devaswom in 1937. Ext.A2 shows that in 1939, out of the three items of properties obtained under Ext.A1, item Nos. 1 and 2 and portion of item No.3 were surrendered to

the Devaswom. Plaint schedule property is part of the property included in Ext.A1 and retained with Sivaramakrishna Iyer after Ext.A2 surrender. Ext.A2 establishes that Sivaramakrishna Iyer surrendered only an extent of 10 X 10 six feet koles out of the third item having a measurement of 300 X 300 six feet koles. Case of respondents is that plaint schedule property is the property obtained under Ext.A1 less the property surrendered. In Ext.A14 judgment in A.S.198 of 1976 and A.S.202 of 1976, which were filed against the judgment in O.S.114 of 1975, learned Sub Judge elaborately considered the claim raised by defendants therein. Appellants herein are claiming right under first defendant in that suit. Learned Sub Judge found that the property claimed by first defendant therein, under whom appellants claimed right was based on Ext.B1 to B3 and they are not in respect of the disputed property but plots A, A3 and A4 marked in Ext.C2 plan therein. It was specifically found by learned Sub Judge that the property claimed by appellants herein could only be the property which lies further towards the south of plot B marked therein. It is on that basis, learned Sub Judge found that plot B belongs to respondents and is in their possession and Nebissu, the wife of first defendant therein who

is first appellant herein is in possession of that property. As appellants are claiming under the first defendant in that suit and the properties were properly identified and demarcated in Ext.A13 report and plan, courts below rightly relied on Ext.A13 to resolve the dispute with regard to the right and title to the plaint schedule property.

9. The plaint itself shows that plaint schedule property is plots B and C in Ext.A13 plan which is Ext.C2 plan in O.S.114 of 1975. The argument of learned counsel appearing for appellants is that even if plot B and C are parts of the property obtained under Ext.A1, unless the property covered under Ext.B37 purchase certificate is identified and established, respondents cannot claim a decree in the suit. The argument is that as Ext.A1 lease merged with Ext.A9 order of the Land Tribunal and title could only be claimed under Ext.A37 purchase certificate as it is the document of title as provided under Section 72(K) of Kerala Land Reforms Act and the property is not identified. The argument could have been accepted if appellants have got a case that apart from the property covered under Ext.A1, respondents have other properties for which Ext.A9 order and Ext.A37 purchase certificate was obtained. On the otherhand, it

is not disputed that jenmom right purchased from Land Tribunal under Ext.A9 is for the property obtained by Sivaramakrishna Iyer under Ext.A1. In such circumstances, even without identifying the property as shown in Ext.A37 purchase certificate, if the plaint schedule property is part of the property covered under Ext.A1, respondents have title to that property. Courts below rightly found that plot B and C in Ext.C2 plan marked in O.S.114 of 1975 is part of the property obtained by Sivaramakrishna Iyer under Ext.A1 and was not surrendered under Ext.A2. This factual finding arrived at by courts below is perfectly correct and in accordance with the evidence on record.

10. Even though it was contended that because of Ext.B11 order of the Land Tribunal in O.A.8839 of 1976 and Ext.B16 purchase certificate, it should have been found that first appellant has title to the property, Ext.B11 order shows that Land Tribunal allowed O.A.8839 of 1976 in favour of appellants and respondents were not made parties to that O.A. At the same time Ext.A13 order of the Land Tribunal in O.A.25040 of 1975 shows that the said O.A was filed by the first defendant in O.S.114 of 1975 and on his death, appellants got themselves impleaded and respondents also got impleaded as additional

respondents and Land Tribunal found that the said property is part of the property obtained by Sivaramakrishna Iyer under Ext.A1 pattom deed and is also part of the property covered under O.S.114 of 1975 and appellants are not tenants of the said property and the jenmom right of the property was already assigned in favour of respondents under Ext.A9 order. Therefore in the light of Ext.A30 order, which is binding on appellants, they are not entitled to claim any right under an order in an O.A filed later and that too without impleading respondents herein and that too after the institution of O.S.114 of 1975. Therefore based on the order of the Land Tribunal or the purchase certificate, respondents are not entitled to claim title to the plaint schedule property.

12. Then the only question is whether title of respondents is barred by adverse possession and limitation. Though it was argued that as respondents contended in O.S.114 of 1975 that predecessors in interest of applellants have plucked cashewnuts from the plaint schedule property, it should have been found that appellants and their predecessors have been in possession of the property at least from 1974 and therefore suit instituted in 1989 should have been dismissed as barred by adverse possession,

there is no admission by respondents in O.S.114 of 1975 that appellants or their predecessor reduced plaint schedule property into their possession. On the other hand, the only allegation was that they forcibly plucked cashewnuts from the cashew trees in the plaint schedule property. In fact first appellate court in that suit found that respondents are in possession of plot B. That finding was confirmed by this court in Ext.A16 judgment. Therefore it is futile for appellants to contend that they have perfected the title by adverse possession. In such circumstances, I find no merit in the appeal. It is dismissed. No cost.

M.SASIDHARAN NAMBIAR, JUDGE

lgk/-

M.SASIDHARAN NAMBIAR, J

S.A.708 OF 1994

JUDGMENT

29.11.2007